CURRENT TRANSPORTATION TOPICS:

RECENT DECISIONS OF THE SUPREME COURT AND THEIR SIGNIFICANCE.

Since the beginning of 1897 transportation questions have occupied a prominent place in the decisions of the United States Supreme Court and in the legislation of the states. The present discussion is confined to the recent decisions of the Supreme Court affecting the power of the states to tax transportation agents, the extent to which competing railway companies can co-operate, and the power of the interstate commerce commission to regulate rates.

The Power of the States to Tax Transportation Companies.

In February and March of this year the United States Supreme Court decided ten cases involving the power of the states to tax transportation companies doing an interstate business. By these decisions the principle is established that the intangible property of such a company "is liable to state taxation, and such taxation is not upon the privilege of doing its business, nor an interference with interstate commerce." These cases concerned the constitutionality of recent laws passed by Kentucky, Indiana and Ohio. The Kentucky law was enacted November 11, 1892; the Indiana act was approved March 6, 1893, and the Ohio law originally passed April, 1893, was re-enacted with slight amendments, May 10, 1894. The Kentucky and Indiana laws apply not only to transportation agencies, but also to corporations generally. The Ohio laws in question apply only to express, telegraph and telephone companies. An Ohio law of May 14, 1894, levied an excise tax on express companies, and two later laws of Ohio, enacted March 19 and 30, 1896, have imposed excise taxes upon street railroad, railroad and messenger or signal companies, freight line and equipment companies, and also upon electric light, gas, natural gas, pipe line and waterworks companies. We are concerned here only with the relation of these laws to transportation companies.

These laws are essentially alike as regards the principle adopted for the valuation and assessment of property. A state board, consisting in Kentucky and Ohio of the auditor, treasurer and attorney-general, and in Indiana of the state board of tax commissioners, acting upon the basis of information which the state auditor is empowered to collect, determines the value of the property owned within the state by the companies to be assessed.

"Said board," to quote from the Ohio statute, "shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid." In other words, it is the duty of the board to ascertain the value of the entire property of a telegraph, express, or telephone company, real estate and capital stock —and if the company be one doing an interstate business to subtract from that total the value, (1) of the real estate situate outside of the state, and (2) the value of the real estate within the state as assessed for taxation, and then (3) to credit to the state such part of the value remaining after making these two deductions as the mileage of the company within the state bears to the company's total mileage. In the laws of Kentucky and Indiana careful rules are formulated for the guidance of the board in making these valuations, while the Ohio statute is less specific in wording, but means practically the same. The purpose in every case being to include in the valuation and assessment the "intangible" as well as the tangible or real property of the companies.

The assessed valuation thus determined by the state board is distributed by the auditor among the counties and by the counties among the townships in proportion to the mileage of the lines included in the counties and townships respectively. The taxes are levied and collected by the townships at the same rate and in the same manner as other taxes.*

The Western Union Telegraph and the Adams Express companies contended that the laws were unconstitutional because the state had no right to tax "intangible" property, and because the tax was an interference with interstate commerce; but the Supreme Court held that:

"Estimating the property of an interstate express company as an entirety, and after deducting the value of all tangible property, assessing its intangible property within the state on the basis of the mileage of its lines within and without the state, are not in violation

* This brief generalized statement of the laws is necessarily an inadequate summary of their contents. The Kentucky law, which may be found in the Kentucky Statutes, p. 1291 *et seq.* of the compilation of 1894, makes the corporations of that state liable to both state and local taxes. The Indiana law provides only for local taxation. The Ohio law of 1893 and May 10, 1894, referring to express, telegraph and telephone companies, provides only for local taxation. The Ohio excise taxes are state and not local.

of the commerce clause or Fourteenth Amendment of the Federal Constitution."*

The Supreme Court was divided five to four on these cases and was doubtless largely influenced by the practical bearings of the subject. The Indiana and Ohio cases were decided February 1, but on account of "the importance of the questions involved and the close division" of the court upon them, a rehearing was granted. In the decision of the court upon this rehearing the court brought further argument to sustain its former decree and concluded with the following pertinent paragraph:

"In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine-spun theories about *situs* should interfere to enable these large corporations, whose business is of necessity carried on through many states, from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires."†

Traffic Associations and the Trans-Missouri Freight Association Case.

The decision rendered by the United States Supreme Court, March 22, in the suit of the United States *v.* The Trans-Missouri Freight Association *et al.*, decrees that "The right of a railroad company to charge reasonable rates does not include the right to enter into a combination with competing roads to maintain reasonable rates." This makes illegal all traffic associations formed by railway companies for the purpose of regulating rates charged on competitive traffic, it lessens greatly the ability of the railways to co-operate, and has necessitated the reorganization of such associations upon a new basis.

The Trans-Missouri Freight Association was established on March 15, 1889, by fifteen railroads operating west of the Missouri River, the States of Missouri and Arkansas and the city of Galveston, and was a typical railway traffic association. The agreement, which became effective April 1, 1889, contained the provisions regarding rates that are usual in such contracts.‡ The

* Levi C. Weir, President of the Adams Express Company *v.* L. C. Norman, Auditor of Public Accounts for the Commonwealth of Kentucky. Decided March 15, 1897.

† Adams Express Company *v.* Ohio State Auditor. Decided March 15, 1897.

‡ This agreement was in effect from April 1, 1889, to November 18, 1892, when the Trans-Missouri Freight Association was dissolved. The agreement which took its place, January 1, 1893, did not re-establish the former traffic association. The

association was to appoint a committee "to establish rates, rules and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines." The members of the association agreed to give notice to the association, five days previous to a regular meeting, of any proposed change in rates, and contracted to abide by the action of that body. Any member might, however, act contrary to the decision of the association by giving a written notice to that body when convened in a regular session, that such independent action was to be taken ten days thereafter. If a member decided to act contrary to the vote of the organization, the association could, if it chose, reduce rates or change its rules for the purpose of compelling the member to cease its independent action. A member of the association might, also, in order to meet the competition of roads not members, make changes in the association's rates and rules without previous notice; but a member doing this was subject to a fine if its action was not subsequently approved by the association.

The United States instituted in the Circuit Court, District of Kansas, a suit in equity for the purpose of having the agreement set aside and declared illegal and void, on the ground of its being in violation of the anti-trust law of July 2, 1890. Section 1 of this law, as is well known, declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations." The decision of the Circuit Court, by District Judge Riner, delivered November 28, 1892, upheld the legality of the association's agreement, Judge Riner maintaining that:

"An agreement between several competing railway companies and the formation of an association thereunder for the purpose of maintaining just and reasonable rates, preventing unjust discriminations by furnishing adequate and equal facilities for the interchange of traffic between the several lines, without preventing or illegally limiting competition, is not an agreement, combination or conspiracy in restraint of trade in violation of the act of July 2, 1890. . . .

"It was not the intention of Congress to include common carriers subject to the act of February 4, 1887, within the provisions of the

new agreement provided for the appointment of the West-Missouri Freight Rate Committee with authority "to establish and maintain reasonable rates." Although it was expected that a permanent traffic association would, on the first of the following April, supersede the temporary agreement of January 1, 1893, such an organization was not effected and the Freight Rate Committee has continued to the present time. Its present name is the Trans-Missouri Freight Rate Committee. Like other traffic organizations its powers over rates have been less since last March than they were previously.

act of July 2, 1890, which is a special statute, relating to combinations in the form of trusts and conspiracies in restraint of trade."*

The case was carried to the United States Circuit Court of Appeals, eighth circuit, where it was argued before Circuit Judge Sanborn and District Judges Shiras and Thayer, May 31 and June 1, 1893. The decision of the court delivered October 2, 1893, by Judge Sanborn, Judge Shiras dissenting, sustained the decree of the lower court. The decision was enforced by a lengthy argument to prove that,

"The contracts, combinations in the form of trust or otherwise, and conspiracies in restraint of trade declared to be illegal in interstate and international commerce by the act of July 2, 1890, entitled an act to protect trade and commerce against unlawful restraints and monopolies, are the contracts, combinations and conspiracies in restraint of trade that had been declared by the courts to be against public policy and void under the common law before the passage of that act.

"The test of the validity of such contracts or combinations is not the *existence* of restriction upon competition imposed thereby, but the *reasonableness* of that restriction under the facts and circumstances of each particular case."†

* From the syllabus of the decision. 53 Federal Reporter p. 440.

† From the syllabus of the decision. The syllabus was prepared by Judge Sanborn himself. The following paragraph of the syllabus contains such an admirable summary of the powers of the Trans-Missouri Freight Association and of the court's views of the economic functions of such organizations that it ought to be quoted here:

"A contract between railroad companies forming a freight association that they will establish and maintain such rates, rules and regulations on freight traffic between competitive points as a committee of their choosing shall recommend as reasonable; that these rates, rules and regulations shall be public; that there shall be monthly meetings of the association composed of one representative from each railroad company; that each company shall give five days' notice before some monthly meeting of every reduction of rates or deviation from the rules it proposes to make; that it will advise with the representatives of the other members at the meeting relative to the proposed modification, will submit the question of its proposed action to a vote at that meeting, and if the proposition is voted down that it will give ten days' notice that it will make the modification notwithstanding the vote before it puts the proposed change into effect, that no member shall falsely bill any freight or bill any at a wrong classification, and that any member may withdraw from the association on a notice of thirty days,—appears to be a contract tending to make competition fair and open, and to induce steadiness in rates and is in accord with the policy of the 'Interstate Commerce Act.' Such agreement cannot be adjudged to be a contract or conspiracy in restraint of trade under the 'Anti-Trust Act,' when it is admitted that the rates maintained under the same have been reasonable, and that the tendency has been rather to diminish than to enhance rates, and there is no other evidence of its consequence or effect."

The case was argued before the United States Supreme Court, December 8 and 9, 1896. That court's decision delivered by Justice Peckham, March 22, 1897, four of the nine judges dissenting, reversed the decrees of the lower courts, and held that,

"The act of July 2, 1890, covers, and was intended to cover, common carriers by railroad.

"The words 'unlawful restraints and monopolies,' in the title of the act of Congress of July 2, 1890, do not show that the purpose of the act was to include only contracts which were unlawful at common law, but refer to and include those restraints and monopolies which are made unlawful in the body of the act.

"The term 'contract in restraint of trade' as used in the act of Congress of July 2, 1890, does not refer only to contracts which were invalid at common law, but includes every contract in restraint of trade, and is not limited to that kind of a contract which is in unreasonable restraint of trade.

. . . . . .

"The policy of the government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the law-making power speaks on a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts."*

This decision of the Supreme Court having made the agreements of all the existing traffic associations illegal, the railway companies generally, with the exception of the eastern trunk lines, withdrew from the associations of which they were members and proceeded to reconstruct their traffic organizations in such a manner as to bring them within the requirements of the court's decision. The general form of the previous organizations was retained, the chief change consisting in carefully reserving the rate-making function to the individual companies, members of the association. For instance, the articles of agreement of the Western Joint Traffic Bureau, the reorganized Western Freight Association, now provide that the board of commissioners "shall supervise and at its option recommend changes in rates, rules and regulations governing the traffic subject to this agreement," but the agreement also carefully stipulates that,

"Nothing herein shall be construed as interfering with the right of individual members to change rates at will, and the board of commissioners shall so exercise the power conferred upon it as to

* From the syllabus of the decision.

discourage, and, so far as possible, prevent violation of the interstate commerce act, or any other federal or state law, or the provisions of the charter of any member, and it shall, with these ends in view, co-operate with federal and state commissions."

Similar provisions are included in the revised agreements of the other freight and passenger traffic associations.

The Joint Traffic Association, composed of the thirty-two "trunk line" companies, the strongest and most efficient traffic organization in existence, did not deem it necessary to reorganize because, when the decision of the Supreme Court in the Trans-Missouri Freight Association case was announced, a suit against this association of the trunk lines was pending in the United States courts. This suit, which is still pending, was instituted by the United States Attorney-General at the instance of Interstate Commerce Commission. The United States asked the court to issue an injunction annulling the agreement of the association on the ground that the contract violated both the anti-trust law of 1890 and anti-pooling section of the interstate commerce act, but the association won the suit both in the United States Circuit Court last year,* and before the Circuit Court of Appeals of New York this year, the latter court's decision being rendered simultaneously with the announcement of the Supreme Court's decision in the Trans-Missouri Freight Association case. Judge Wallace, in the Circuit Court of Appeals, Judge Lacombe concurring, held that the interstate commerce act could not be invoked in the case. "If there has been," he said, "any violation of the pooling section of that act, because of the existence of contracts, the United States has no right under that act by injunction. . . . The United States has no remedy by injunction to annul a contract." Judge Wallace did not think that the anti-trust law was intended to apply to railway carriers.

The suit against the Joint Traffic Association will be heard by the Supreme Court early in the October term, and the probabilities are that it will decide that this organization is as much of "a combination in restraint of trade" as was the Trans-Missouri Freight Association. The chances for the success of the Joint Traffic Association in its suit have been lessened by some of the testimony secured by the Interstate Commerce Commission in an investigation which it conducted in Chicago the second week of last June. The commission secured evidence of the existence of "physical" or traffic pools apportioning, according to fixed percentages, a part of the freight carried by several members of the Joint Traffic Association. This apportionment was made by the arbitrators of the association, but

Cf. ANNALS, Vol. ix, p. 110, January, 1897.

whether they were acting for the Joint Traffic Association or for certain roads, members of the association, the available information does not make clear.

It is doubtful, however, whether the Joint Traffic Association will be able to maintain its present organization without change of form, at least for any great length of time, even should the Supreme Court not find the association's agreement illegal. It has been more difficult this year than it was last for the organization to secure the observance of authorized rates, and several instances of secret and open cutting have occurred. The insolvency of the Baltimore & Ohio and the influence of the Trans-Missouri decision have placed a severe strain on the Joint Traffic Association. It is probable that no traffic association can be made as effective as business interests demand until both the interstate commerce act and the anti-trust law are so amended as to permit greater co-operation among the railroads.

The Supreme Court's decision of March 22 has revived the agitation for the legalization of pooling contracts. In response to this agitation the Senate Committee on Interstate Commerce, after considering various measures and receiving instructions from the Senate, has drawn up and submitted a bill legalizing pooling contracts and making other amendments to the act of February 4, 1887. This bill, it is expected, will be considered at length during the next session of Congress.

The Interstate Commerce Commission, though its members are not all of the same opinion regarding details of action, is opposed to the legalization of pooling, unless the commission's powers are at the same time largely increased. The chairman of the commission and one other member are opposed to the policy of pooling, two other members "would not oppose the passage of a pooling bill, provided the other amendments which are necessary to make the interstate commerce laws effective were made a part of the bill,"* while the other commissioner has frequently advocated pooling and would doubtless favor an early action of Congress legalizing such contracts. †

The Rate-Regulating Powers of the Interstate Commerce Commission.

The United States Supreme Court has decided that the Interstate Commerce Commission does not possess the power to prescribe railway rates. The commission had previously been denied this power

Cf. A letter written May 19, 1897, by the Interstate Commerce Commission to Senator Cullom, Chairman of the Committee on Interstate Commerce.

† *Cf.* A paper by Hon. Martin A. Knapp on "Some Observations on Railroad Pooling," in the ANNALS, Vol. viii, p. 127, July, 1896.

by several inferior United States courts, and two decisions of the Supreme Court had contained expressions which left little uncertainty regarding the court's views on this subject.* The case of the Interstate Commerce Commission *v.* The Cincinnati, New Orleans & Texas Pacific Railway Company *et al.*, decided by the Supreme Court, May 24, involved this question in a simple form and the meaning of the court's decision is unmistakable.

The case grew out of a complaint made to the Interstate Commerce Commission by the freight bureaus of Chicago and Cincinnati that the rates from those cities to southern ports were so high as compared with the rates from the North Atlantic seaboard territory to the South, as to constitute a discrimination against Chicago, Cincinnati and other cities in the "central territory." The complaint was sustained by the commission, and the railways complained against were ordered to reduce their rates on certain classes of freight to Chattanooga and other southern cities so as to correspond with the rates from the eastern cities. The railways refused to comply and the commission brought the above suit to secure the enforcement of its order. The Circuit Court denied the right of the commission to prescribe rates, and the Supreme Court, Justice Harlan dissenting, confirmed the decree of the inferior court. Justice Brewer, who prepared the decision of the court, tersely summarizes the main points of his comprehensive argument in the following paragraph:

"We have, therefore, these considerations presented: First, The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function, and having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage is a power of supreme delicacy and importance. Second, That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood and have been frequently used, and if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct. Third, Incorporating into a statute the common law obligation resting upon the carrier to make all its charges reasonable and just, and directing the commission to execute and enforce the provisions of the act, does not by implication

* *Cf.* ANNALS, Vol. ix, p. 107, January, 1897, where reference is made to the decisions of the Supreme Court in the "Social Circle" and "Import Rate" cases.

carry to the commission or invest it with the power to exercise the legislative function of prescribing rates which shall control in the future. Fourth, Beyond the inference which irresistibly follows from the omission to grant in express terms to the commission this power of fixing rates, is the clear language of Section 6, recognizing the right of the carrier to establish rates, to increase or reduce them, and prescribing the conditions upon which such increase or reduction may be made, and requiring, as the only conditions of its action, first, publication, and, second, the filing of the tariff with the commission. The grant to the commission of the power to prescribe the form of the schedules, and to direct the place and manner of publication of joint rates, thus specifying the scope and limit of its functions in this respect, strengthens the conclusion that the power to prescribe rates or fix any tariff for the future is not among the powers granted to the commission."

This and other recent decisions of the Supreme Court have determined quite definitely the character of the powers which the Interstate Commerce Commission may exercise under present laws. The commission has more than advisory powers, but is without mandatory authority sufficient to enable it to regulate railway transportation charges except in an indirect way. If a shipper has been charged an unreasonable rate the commission can help him to collect damages, but it cannot prevent the railway company from charging the same shipper or others unreasonable rates in the future. The commission that is half advisory and half mandatory can hardly be very successful. Congress will have to make it either one or the other. The commission has long been urging Congress to grant it greater powers, and has recently declared that:

"The authority of the commission . . . to determine and order reasonable rates in cases tried, wherein the rates are challenged, should be granted and stated in unquestionable terms, and proper means provided for enforcing such determination, and we believe a provision of law making such determination and order of the commission obligatory on the carriers at once and until reversed or set aside by a court of competent jurisdiction will afford guarantee for the observance and enforcement of such orders.*

The decision of the commission is doubtless the correct one. The type of commission without power has been very successful in Massachusetts and less so in some other states; but the circumstances which account for the success of those state commissions do not obtain in the case of national regulation of railways. The Massachusetts commission is able readily to create a public opinion

* From the Commission's letter of May 19, above referred to.

regarding a particular question, and the legislature has shown itself an efficient means of making this aroused public opinion effective. But the mileage of the railroads engaged in interstate commerce is too great, the United States is too large, the economic interests of the people of different sections of the country are too diverse and the difficulties of securing congressional action are too many for us ever to secure an efficient regulation of interstate railway transportation by means of a commission without ample mandatory powers.

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